

to believe he or she will be engaged in the performance of an investigative or litigating function or a Commission adjudicatory employee has knowledge that a notice of hearing or other comparable order will be issued in accordance with §§ 2.104(a), 2.105(e)(2), 2.202(c), 2.204, 2.205(e), or 2.703.

(2) The prohibitions of this section will cease to apply to the disputed issues pertinent to a full or partial initial decision when, in accordance with § 2.786, the time has expired for Commission review of the decision.

(e) Communications to, from, and between Commission adjudicatory employees not prohibited by this section may not serve as a conduit for a communication that otherwise would be prohibited by this section or for an ex parte communication that otherwise would be prohibited by § 2.780.

(f) If an initial or final decision is stated to rest in whole or in part on fact or opinion obtained as a result of a communication authorized by this section, the substance of the communication must be specified in the record of the proceeding and every party must be afforded an opportunity to controvert the fact or opinion. If the parties have not had an opportunity to controvert the fact or opinion prior to the filing of the decision, a party may controvert the fact or opinion by filing a petition for review of an initial decision, or a petition for reconsideration of a final decision that clearly and concisely sets forth the information or argument relied on to show the contrary. If appropriate, a party may be afforded the opportunity for cross-examination or to present rebuttal evidence.

[53 FR 10366, Mar. 31, 1988, as amended at 56 FR 29409, June 27, 1991]

§ 2.786 Review of decisions and actions of a presiding officer.

(a) Within forty (40) days after the date of a decision or action by a presiding officer, or within thirty (30) days after a petition for review of the decision or action has been filed under paragraph (b) of this section, whichever is greater, the Commission may review the decision or action on its own motion, unless the Commission, in its discretion, extends the time for its review.

(b)(1) Within fifteen (15) days after service of a full or partial initial decision by a presiding officer, and within fifteen (15) days after service of any other decision or action by a presiding officer with respect to which a petition for review is authorized by this part, a party may file a petition for review with the Commission on the grounds specified in paragraph (b)(4) of this section. The filing of a petition for review is mandatory for a party to exhaust its administrative remedies before seeking judicial review.

(2) A petition for review under this paragraph must be no longer than ten (10) pages, and must contain the following:

(i) A concise summary of the decision or action of which review is sought;

(ii) A statement (including record citation) where the matters of fact or law raised in the petition for review were previously raised before the presiding officer and, if they were not why they could not have been raised;

(iii) A concise statement why in the petitioner's view the decision or action is erroneous; and

(iv) A concise statement why Commission review should be exercised.

(3) Any other party to the proceeding may, within ten (10) days after service of a petition for review, file an answer supporting or opposing Commission review. This answer must be no longer than ten (10) pages and should concisely address the matters in paragraph (b)(2) of this section to the extent appropriate. The petitioning party shall have no right to reply, except as permitted by the Commission.

(4) The petition for review may be granted in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to the following considerations:

(i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;

(ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;

(iii) A substantial and important question of law, policy or discretion has been raised;

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(iv) The conduct of the proceeding involved a prejudicial procedural error; or

(v) Any other consideration which the Commission may deem to be in the public interest.

(5) A petition for review will not be granted to the extent that it relies on matters that could have been but were not raised before the presiding officer. A matter raised sua sponte by a presiding officer has been raised before the presiding officer for the purpose of this section.

(6) A petition for review will not be granted as to issues raised before the presiding officer on a pending motion for reconsideration.

(c) If within thirty (30) days after the filing of a petition for review the Commission does not grant the petition, in whole or in part, the petition shall be deemed denied, unless the Commission in its discretion extends the time for its consideration of the petition and any answers thereto.

(d) If a petition for review is granted, the Commission will issue an order specifying the issues to be reviewed and designating the parties to the review proceeding and direct that appropriate briefs be filed, oral argument be held, or both.

(e) Petitions for reconsideration of Commission decisions granting or denying review in whole or in part will not be entertained. A petition for reconsideration of a Commission decision after review may be filed within ten (10) days, but is not necessary for exhaustion of administrative remedies. However, if a petition for reconsideration is filed, the Commission decision is not final until the petition is decided.

(f) Neither the filing nor the granting of a petition for review will stay the effect of the decision or action of the presiding officer, unless otherwise ordered by the Commission.

(g) Certified questions and referred rulings. A question certified to the Commission under § 2.718(i) or a ruling referred under § 2.730(f) must meet one of the alternative standards in this subsection to merit Commission review. A certified question or referred ruling will be reviewed if it either—

(1) Threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or

(2) Affects the basic structure of the proceeding in a pervasive or unusual manner.

[56 FR 29409, June 27, 1991]

§ 2.788 Stays of decisions of presiding officers pending review.

(a) Within ten (10) days after service of a decision or action of a presiding officer any party to the proceeding may file an application for a stay of the effectiveness of the decision or action pending filing of and a decision on a petition for review. This application may be filed with the Commission or the presiding officer, but not both at the same time.

(b) An application for a stay must be no longer than ten (10) pages, exclusive of affidavits, and must contain the following:

(1) A concise summary of the decision or action which is requested to be stayed;

(2) A concise statement of the grounds for stay, with reference to the factors specified in paragraph (e) of this section; and

(3) To the extent that an application for a stay relies on facts subject to dispute, appropriate references to the record or affidavits by knowledgeable persons.

(c) Service of an application for a stay on the other parties shall be by the same method, e.g., telecopier message, mail, as the method for filing the application with the Commission or the presiding officer.

(d) Within ten (10) days after service of an application for a stay under this section, any party may file an answer supporting or opposing the granting of a stay. This answer must be no longer than ten (10) pages, exclusive of affidavits, and should concisely address the matters in paragraph (b) of this section to the extent appropriate. No further replies to answers will be entertained. Filing of and service of an answer on the other parties must be by the same method, e.g., telecopier message, mail,